THE CENTRAL LAW JOURNAL.

Hon. JOHN F. DILLON, Editor. } ST. LOUIS, THURSDAY, FEBRUARY 12, 1874. { SUBSCRIPTION: $8 PER ANNUM, in Advance.
S. D. THOMPSON, Ass'te Editor. }

Disturbing Religious Worship—A Curious Case.

It is not often that a case arises combining the comical with the serious in as peculiar a manner as the case of The State v. Linkhaw, 69 North Carolina Reports, 214. The defendant, a member of the Methodist church, was indicted for disturbing the congregation. It was in proof that he sang, during religious worship, in such a manner as to disturb the congregation, and greatly interrupt the services. One of the witnesses imitated his singing in a manner which "produced a burst of prolongued and irresistible laughter, convulsing alike the spectators, the bar, the jury and the court." It was in evidence that the disturbance occasioned by his singing was decided and serious. "The effect of it was to make one part of the congregation laugh, and the other mad; the irreligious and frivolous enjoyed it as fun, while the serious and devout were indignant." The defendant, being on many occasions expostulated with by the church-members and authorities, replied, "that he would worship God, and that as a part of his worship it was his duty to sing."

It was not contended by the state that the defendant had any purpose or intention to disturb the congregation; but on the contrary, it was admitted that he was conscientiously taking part in the religious services. Nevertheless, the trial court instructed the jury that he must be presumed to have intended the necessary consequences of his bad singing; and they accordingly returned a verdict of guilty. But the supreme court (SETTLE, J.) said that this admission of the state put an end to the prosecution; that, although a man is generally presumed to intend the consequences of his acts, yet the presumption is here rebutted by a fact admitted by the state. "It would seem," said the court, "that the defendant is a proper subject for the discipline of the church, but not for the discipline of the courts."

Bankrupt Act—Illegal Preference—Confession of judgment by Corporation—Is an Insurance Company a Banker or Trader?

Several interesting questions under the bankrupt act were decided by DRUMMOND, circuit judge, on the 31st ult., in reversing the decree of the district court for the northern district of Illinois, adjudicating the Great Western Telegraph Company a bankrupt. The petition was filed by one Hilton, claiming to be a creditor of the company for over $20,000, evidenced by several judgments obtained on promissory notes made by George L. Otis, treasurer, to Selah Reeve, and by him indorsed to David A. Gage, and by Gage to petitioner. Hilton alleged as acts of bankruptcy, that the company allowed judgments to be rendered against them by default in favor of the Commercial National Bank, on which executions were issued.

The company filed an answer denying the acts of bankruptcy, and alleging that they had had the judgments entered by default set aside, and pleas entered, and that, as to the judgment by confession, the power of attorney was void, since Otis, who gave it, was not authorized. The case was tried, and the company was adjudicated bankrupt. The case was taken before the circuit judge by a petition for review.

In giving his judgment, reversing the decree of adjudication of bankruptcy, Judge DRUMMOND is reported as making, in substance, the following observations: "That before the late decision of the Supreme Court of the United States in the case of Wilson against the City Bank of St. Paul, 1 CENTRAL LAW JOURNAL, 40, overruling the case of Buchanan v. Smith, 16 Wall. 277, it had been held that where a party was insolvent and allowed judgments to be obtained against him by default, without defence, such an act was suffering his property to be taken in legal process, within the meaning of the bankrupt law, and was the commission of an act of bankruptcy. But the rule laid down by that case establishes the reverse proposition.

"It was indispensable, also, in order that the judgments by confession be upheld, that the execution of the warrants of attorney by which judgments were confessed, should be clearly established as given, by the proper authority. In this case, it was contended that the attaching the seal of the corporation to the warrant was sufficient evidence of the lawful authority. The decision of the supreme court of this state in the Terwilliger case practically decided that the persons professing to act as officers were in reality enemies of the interests of the corporation, and the proof offered in the court below, of the seal having been attached by duly authorized officers was not sufficient. The executive committee, whose duties were defined by the charter, passed a resolution approving the execution of certain notes which were issued, upon which judgments were ultimately obtained, but made no allusion to warrants of attorney.

"Again, there being a controversy in the state courts as to the validity of the judgments which were rendered, the court below should have given a reasonable time to contest the validity of these judgments, before foreclosing all their rights by an adjudication in bankruptcy, not an indefinite time, but a reasonable time, and should have permitted and required it to contest these matters in the state courts.

"In regard to the alleged insolvency, the corporation being in the hands of its enemies, and on account of the peculiar condition of its property, it was difficult to say if it were absolutely insolvent. But assuming the validity of the notes, there might be a question as to whether non-payment thereof would be an act of bankruptcy, the company not being a merchant or trader. But it was not necessary to consider this question. It is better for the interests of the petitioning creditor that the company should be permitted to prosecute its own affairs, rather than be forced into bankruptcy. The foundation of these proceedings being of such a doubtful character, the court did not feel disposed to decide the company bankrupt. The adjudication would, therefore, be reversed, and an order be made of the district court to permit the company to contest the proceedings of the state courts and warrants of attorney.

"This does not dismiss the proceedings in bankruptcy, but sets aside the adjudication, and allows the company time to de-

cide the suits in the circuit court against them, or the petitioning creditors can amend their petition, alleging new grounds, and obtain an adjudication in that way."

Negligence—Liability of a Railroad Company for Injury to a Child, Caused by an Unguarded and Unfastened Turn-table.

The Supreme Court of the United States, on the 28th ultimo, affirmed the important principle that under certain circumstances, a railroad company may be liable on the ground of negligence, for a personal injury to a child of tender years, caused by a turn-table, built by a company upon its own uninclosed land, and left unguarded and unlocked, in a situation that renders it likely to cause injury to children.

The case in which this doctrine was asserted, was Stout v. Sioux City & Pacific Railroad Co., and is reported in the court below, in 2 Dillon, C. C. R. 294. The action was brought by an infant, by his next friend, for an injury which happened in the town of Blair, in Nebraska, under the following circumstances:

The plaintiff was a boy of the tender age of six years and two or three months. The town of Blair was a new place, and contained a population of about one hundred people. On the plat of the town is a tract of land of variable width, extending almost the entire length of the plat, owned and used by the defendants for their road-bed and depot grounds, and which divides the town into two portions. The cross streets of the town run up to this railroad ground and there stop, with exception of one or two streets, which were laid out across it. On this ground, which was not enclosed, was situated the defendant's depot house, and, about one-quarter of a mile distant from the depot house was located the turn-table, on which the plaintiff was injured. There were but few houses in the immediate neighborhood of the turn-table, and the plaintiff's parents lived in another portion of the town, and about three-fourths of a mile distant from the turn-table.

The plaintiff, without the knowledge of his parents, started with one or two other boys to go to the defendant's depot, about half a mile away, with no definite purpose in view. When the boys had arrived at the depot, it was proposed by some of them to go to the turn-table to play; and the boys proceeded to the turn-table, about a quarter of a mile distant, traveling along the defendant's road-bed or track. When the boys had reached the turn-table, which was not attended or guarded by any employe of the company, and which was not then fastened or locked, and which revolved easily on its axis, two of them commenced to turn it, and the plaintiff, in attempting to get upon it, (being at the time upon the railroad track), had the misfortune to get his foot caught between the end of the rail on the turn-table, as it was revolving, and the end of the iron rail on the main track of the defendant's road, and his foot was badly cut and crushed, resulting in a serious and permanent injury.

There was the evidence of one witness, an employe of the company, that he had previously seen boys playing at the turn-table, and had forbidden his children to play there. But this witness had no charge of the turn-table, and did not communicate the fact to any of the officers or employes of the company having charge of the turn-table. It appeared from the plaintiff's testimony, that he had not before that day been engaged in playing at the turn-table. The turn-table was constructed on the defendant's own land, in the usual and ordinary manner.

The ground of complaint against the defendant, as set out in the petition, was that the turn-table, as it was constructed, was of a dangerous nature and character, when unlocked or unguarded, and that being, as it is alleged, in a place much resorted to by the public, and where children were wont to go and play, it was the *duty* of the defendant to keep the same securely locked or fastened, so as to prevent it from being turned or played with by children, or to keep the same guarded, so as to prevent injuries such as befell the plaintiff. The basis of this action, therefore, was that the defendant owed the plaintiff a duty of this kind; that, in failing to discharge this duty, the defendant was guilty of negligence; that this neglect caused the injury to the plaintiff, and that, therefore, the defendant is liable in damages therefor.

On these facts the company contended that the jury should be directed, as *matter of law*, that in respect to its turn-table it owed no duty towards the plaintiff, and hence, was under no liability to him. The circuit court refused, but submitted the question of negligence to the jury under instructions as to the elements of actionable negligence in such a case. The case appeared to be one of first impression. The jury found for the plaintiff and judgment was rendered upon the verdict, and it is this judgment which has recently been affirmed by the Supreme Court.

That court hold, under the circumstances, that it was for the jury, and not the court, to determine whether the alleged negligence, which was the foundation of the action, was established. We shall hereafter lay before our readers the text of the opinion in this novel and important case. Several other like injuries caused by turn-tables have been mentioned in the newspapers within the past two years.

Contract of Life Insurance not Abrogated by War.

JOHN WOODSON SMITH AND FANNIE M. SMITH, HIS WIFE, RESPONDENTS, v. THE CHARTER OAK LIFE INSURANCE COMPANY, APPELLANTS.

In the Circuit Court of Saint Louis County, Missouri, General Term, Jauuary, 1873.

Hon. JAMES J. LINDLEY,
" CHESTER H. KRUM,
" GEORGE A. MADILL,
" JAMES K. KNIGHT,
" HORATIO M. JONES, } Judges.

1. **The late Civil War—When it began.**—The war of the rebellion is held to have begun in the state of Virginia, at the date of the issuance by the president of the United States of his proclamation of intended blockade, which embraced that state, namely, on the 29th day of April, 1861.

2. **Life Insurance—War—Agent in Insurrectionary State.**—The breaking out of the late war did not operate to sever the relation of principal and agent between a Life Insurance company domiciled in one of the loyal states and its agent in an insurrectionary state; and the payment of premiums to such an agent was not unlawful.

3. ——. **Tender of Premium to Agent in Insurrectionary State.**—When, therefore, a premium was tendered to such an agent, it was his duty, notwithstanding the fact that communication with his principal was interrupted by hostilities, to receive it unconditionally; and the refusal so to receive it, constitutes on the part of the insurance company, a breach of the covenants of the policy, for which such company is liable in damages.

4. ——. ——. **Measure of Damages in such Case.**—The measure of damages in such a case, is the value of the policy at the time of the breach of its covenants by the insurer.

5. ——. ——. **Subsequent Breach of Policy by Insured.**—The fact

that after the covenant of the policy had been thus broken by the insurer, the insured, in violation of the stipulations of the policy, voluntarily entered the Confederate army, does not prejudice his right to recover damages of the insurer for the previous violation of the contract on his part.

6. ——. ——. **Case in Judgment.**—In the year 1853, a resident of the state of Virginia effected an insurance upon his life for the benefit of his wife, in a company whose corporate residence was in the state of Connecticut. Payment of the stipulated premiums was regularly made until the 6th day of May, 1861, when, a payment becoming due, it was made to the agent, who received it upon the condition that he should be able to communicate with his principal and procure the proper receipt for the same. Being unable to communicate with his company, he subsequently, on the 14th day of March, 1862, returned the money to the insured. In November, 1861, the insured entered the Confederate army without the consent of the insurer, and remained in such service until the year 1863. The insurer having, at the close of the war, refused to renew the policy, the insured, jointly with his wife, brings this action to recover damages for a breach of the covenant of the policy, alleging that by reason of his advanced age, he is unable to effect an insurance on his life except at a much greater cost than the premiums stipulated to be paid in this policy. *Held*, that the plaintiffs are entitled to recover, and that the measure of their damages is the value of the policy on the 6th day of May, 1861.

This case comes here by appeal from special term, having arisen under a policy of life insurance issued by the appellants.

The petition alleges, that on the 6th day of May, 1853, in consideration of the payment of an annual premium of one hundred and four dollars, during the life of John Woodson Smith, the appellants issued the policy sued on, whereby they insured the life of said Smith in the sum of five thousand dollars for the term of his natural life. The policy was obtained for the benefit of the wife of said Smith, the respondent, Fannie M. Smith. The petition alleges, that the premium due on the 6th of May, of each year, was paid from 1853 to 1861, but that on the 6th day of May, 1861, the premium then due and payable, was tendered by respondents to the appellants, who thereupon refused to receive and accept such premium. It is alleged also, that since the 6th of May, 1861, the appellants have refused to receive premiums which have subsequently become due, and have declared the policy void and of no effect. The petition negatives the conditions of avoidance specified in the policy, and alleges, that since the breach of the contract of insurance by the appellants, in 1861, John Woodson Smith has advanced so far in years, that his life cannot be insured in a solvent company at as favorable rate of premium as is stipulated for in the policy sued on, and that his life can only be insured by the payment of a premium largely in excess of that required by the contract of the appellants.

Under this petition, the respondent, Fannie M. Smith, seeks to recover such sum by way of damages, as will place her in as good a condition as she would have been in under the policy, had it not been terminated by the appellants.

The answer is a traverse, together with an affirmative defence of failure on the part of the respondents to pay the annual premiums due in the year 1861, and for each year thereafter. The answer alleges also a breach of the conditions contained in the policy; in that John Woodson Smith voluntarily entered the military service of the so-called Confederate States, and remained in such military service without having first obtained the consent of the appellants. The answer sets up a further breach, in that Smith has become so intemperate as to seriously impair his health. There is also a plea of the statute of limitations. To this answer there is a reply.

The case was tried at special term before a jury. Evidence was introduced by the respondents, which showed that they are husband and wife; that the premiums due under the policy were paid down to May 6, 1861; that, on the last named day, the amount of the premium was tendered by a brother of the assured to the agent of the appellants, in Lynchburg, Virginia; that the agent hesitated in regard to receiving this premium, on the ground that communication had ceased between his principal and himself; that he received the money, however, upon the condition, that he could communicate with his principal and obtain a proper receipt, and that subsequently, on the fourteenth day of March, 1862, the agent returned the money to the brother of the assured, who accepted it—the agent stating, that he had been unable to communicate with his principal and that he declined to take upon himself the responsibility of receiving such premium in the name of the appellants. The respondent, John Woodson Smith, testified that he entered the military service of the so-called Confederate States voluntarily in November, 1861, and remained in such service until the year 1863. It appeared, that the assured is a man in good health and not addicted to habits of intemperance. This is all of the evidence which is material to the questions raised by the instructions, whose propriety the appellants dispute, under this appeal. It should be stated, however, that evidence was introduced showing the present value of the policy sued on, and that the verdict was rendered in accordance with such testimony.

Samuel Knox, Esq., for appellants; *Messrs. Noble, Orrick & Shannon* for respondent.

KRUM, J., delivered the opinion of the court.

At the outset of this opinion, we announce, that we regard as proper the theory of the respondents as to the measure of the recovery upon the policy, whose covenants it is alleged were broken by the appellants. If the facts of this case show a breach of the policy sued on, then the measure of respondents' recovery will be the present value of such policy at the time of such breach. It is a matter clearly susceptible of determination; and we cannot see why the rule of recovery is not just and equitable. If, without fault on his part, a contract of life insurance be terminated unlawfully by the company, it cannot be maintained successfully, that the assured, cannot sue at once as for a breach of the covenants of such policy, and that the measure of his recovery will not be the value of his policy at the time of such breach.

Passing now to the questions raised by the instructions given for the respondents, we shall consider, first, the direction to the jury, as to the time when the war of the rebellion began in the state of Virginia. Under this instruction, the jury were directed that the proclamation of the president of the United States, dated August 16, 1861, was to be deemed and taken by them as the beginning of actual hostilities between the United States and the so-called Confederate States; and that before such date, neither of the parties to the contract of insurance was released from obligation under it by reason of the war of the late rebellion. The appellants complain of this instruction as designating an improper date for the beginning of the war in Virginia. This instruction does not state correctly the date when the war began in Virginia. This matter has been adjudicated expressly by the Supreme Court of the United States, in the case of the Protector, 12 Wall. 700. There the chief justice, in delivering the opinion of the court, uses this language: "Acts of hostility by the insurgents occurred at periods so various, and of such different degrees of importance, and in parts of the country so remote from each other, both at the commencement and the close of the late civil war, that it would be difficult, if not impossible, to say on what precise day it began or terminated. It is necessary, therefore, to refer to some public act of the political departments of the government to fix the dates; and, for obvious reasons, those of the executive department, which may be, and, in fact was, at the commencement of hostilities, obliged to act during the recess of congress, must be taken."

And the court say, that the proclamation of intended blockade by the president, may be assumed as marking the date at which the war began. The proclamation of intended blockade, which embraced the state of Virginia, was issued on the 27th day of April, 1861. So that on the 6th of May, 1861, war existed in the state of Virginia.

It remains to be determined, now, what effect the existence of war had upon the duties of the parties to the contract of insurance. At the instance of the respondents, the jury were instructed that it was the duty of the agent of the appellants, at Lynchburg, Virginia, to receive the premium, unconditionally, upon the 6th of May, 1861. This was a proper direction. The inauguration

of war, in the state of Virginia, on the 27th day of April, 1861, did not operate to sever the relations of principal and agent, between the appelants and their agent at Lynchburg. The payment to such agent was lawful; it was incumbent upon the respondents to make such payment, and it was the duty of the agent to receive it.

In Buchanan v. Carey, 19 Johns. 136, a contract made before the war of 1812, by a citizen of the state of New York, to deliver timber in the United States to a citizen of Canada, was upheld to sanction a delivery of timber, during the war, to an agent of such citizen of Canada, said agent residing then in the state of New York. The contracting parties had become enemies before the delivery of the timber called for by the contract. But the alien enemy had an agent in the state of New York, to whom the delivery was made in behalf of his principal. The court held, that had such contract been made during the war, it would have been illegal and void, but, as it was made before the war, no rule of public policy forbid its execution within the limits of the United States, after the war had begun, by a delivery of the property covered by the contract, to an agent of the alien.

In Conn. v. Penn., 1 Peters, Circuit Court, 496, it is held, that "the rule can never apply in cases where the creditor, although a subject of the enemy, remains in the country of the debtor, or has a known agent there authorized to receive the debt, because the payment to such creditor or his agent could, in no respect, be construed into a violation of the duties imposed by a state of war upon the debtor. The payment, in such cases, is not made by an enemy, but it is no objection, that the agent may possibly remit the money to his principal." This doctrine is approved in Ward v. Smith, 7 Wall. 447. The case of the United States v. Grossmayer is precisely in point. There, during the war of the rebellion, Grossmayer, a citizen of New York, being a creditor of one Einstein, a citizen of and resident of Georgia, made an arrangement with Einstein, by which the latter was to remit to the former the amount of his debt in money, or if that were not possible, to invest the sum in cotton and hold it for Grossmayer until the close of the war. Under this arrangement, Einstein bought cotton, and shipped it to Savannah, to be held there for Grossmayer. It fell into the hands of the United States forces and was sold. Grossmayer preferred a claim for the proceeds before the court of claims, and that court gave judgment in his favor. Upon appeal, this judgment was reversed, the supreme court holding that the contract made during the war was not only inconsistent with duties growing out of a state of war, but in open violation of a statute on the subject. The court say: "A prohibition of all intercourse with an enemy during the war affects debtors and creditors on either side, equally with those who do not bear that relation to each other. We are not disposed to deny the doctrine, that a resident in the territory of one of the belligerents may have, in time of war, an agent residing in the territory of the other, to whom his debtor could pay his debt in money, or deliver to him property in discharge of it; but in such a case, the agency must have been created before the war began; for there is no power to appoint an agent for any purpose after hostilities have actually commenced, and to this effect are all of the authorities. United States v. Grossmayer, 9 Wall. 72.

We hold, therefore, that the agent was bound to receive unconditionally, the premium which became due and was tendered on May 6, 1861. The misdirection as to the time when the war began in Virginia, was immaterial. This defect was cured, moreover, by the farther direction, that before the date named in the instruction, neither party was released from his obligation under the contract. This, however, was not because the war did not begin in Virginia until August 16, 1861, but because the outbreak of the war there on the 27th of April, 1861, did not alter the respondent's duty to pay the premium, or the agent's duty to receive it when tendered. The contract of life insurance is executory on the part of the insurer, while it has been executed by the payment of the premiums due from the insured. It is said to be a continuing contract, in the sense that it is to be performed in the future; but it is not a contract of continuance in its performance. Cohen v. N. Y. Mut. Life, 50 N. Y. 610. It is settled law, that the contract of life insurance is not dissolved by the outbreak of war. And in Sands v. N. Y. Life Insurance Co., 50 N. Y. 626, a payment by the assured to the agent of the company within the limits of the Confederate States, during the war, was sustained as valid, although such payment was made in Confederate notes. "The result is," say the supreme court of Massachusetts, in Kershaw v. Kelsey, 100 Mass. 561, "that the law of nations, as judicially declared, prohibits all intercourse between citizens of the two belligerents, which is inconsistent with the state of war between their countries; and that this includes any act of voluntary submission to the enemy, or receiving his protection, as well as any act or contract which tends to increase his resources; and every kind of trading, or commercial dealing, or intercourse, whether by transmission of money or goods, or order for the delivery of either, between the two countries, directly or indirectly, or through the intervention of third persons or partnerships, or by contracts in any form, looking to, or involving such transmission, or by insurances upon trade, with or by the enemy. Beyond the principle of these cases, the prohibition has not been carried by judicial decision." We hold, therefore, that the outbreak of the war did not operate to discontinue the appellant's agency in Virginia. The appellants may have expressly revoked the authority of their agent, but no such revocation has been shown. It was lawful on the part of the respondents to pay the premium to the agent. It was not only lawful for him to receive it in the name of his principal, but it was his duty to receive it without condition. He could have held it until the close of the war, but even if he had remitted it to his principal, such action on his part could not prejudice either party. These views are supported, not only by the authorities already cited, but by elaborate considerations of the doctrine in New York Life Insurance Company v. Clopton, 7 Bush. (Ky.) 179; Manhattan Life Ins. Co. v. Warwick, 20 Grattan, 614, and Hamilton v. Mutual Life Ins. Co., 9 Blatchford, 234.

The jury were instructed farther, in regard to the premium due on May 6, 1861, that if they believed that if the respondents paid such premium when due, and voluntarily accepted its return in March, 1862, then they should find for the appellants. On the other hand, if they believed that the agent refused to receive the premium except upon condition, and afterwards, in accordance with such condition, required the respondents to accept a return of such premium, then such conditional receipt was not in conformity to the contract of insurance, and the jury should find for the respondents. This direction put the issue of payment of premium fairly before the jury. If it was paid and then the respondents consented to receive it back, they could not recover in this action. But it is manifest, that there was no payment on the 6th of May, 1861. In order to constitute a payment, there must be both a delivery by the debtor and an acceptance by the creditor, with the purpose on the part of the former to part from, and of the latter to accept of, the immediate ownership of the thing passed from the one to the other. Thompson v. Kellogg, 23 Mo. 281. But the agent received the premium conditionally, and upon a failure of the condition, returned the money to the respondents. The respondents were ready, and offered to pay the premium when due—this was all that could be expected of them. When the agent of the appellants refused to receive the premium except upon conditions, there was a breach of the contract of insurance, and the appellants became liable to the respondents. In view of what we have said in regard to the attitude of the parties in May, 1861, the subsequent entry of the assured into the military service of the Confederate States, could not have preju-

diced the rights of the respondents against the appellants. The contract was broken already—a cause of action had occurred already in favor of the respondents.

It seems to us that a proper determination of the case was had at special term. The case was tried upon a different theory from that which has been indicated; but the judgment is, manifestly, for the proper party, and we have been able to see no reason why it should be disturbed.

The judgment will, therefore, be affirmed.

The other judges concur.

AFFIRMED.

NOTE.—We have before us two other well-considered opinions upon the subject embraced in the above case: One by Hon. ROBERT A. HILL, sitting in the circuit court of the United States for the southern district of Mississippi, in the case of Seyms v. New York Life Insurance Co., and one by Hon. H. H. EMMONS, sitting in the circuit court of the United States for the western district of Tennessee, in the case of Tait v. New York Life Insurance Co. Judge HILL'S opinion is ably reasoned, but does not review the recent cases on the subject. He takes substantially the same view of the question as that taken in the principal case. Judge EMMONS' opinion is reasoned with his accustomed ability. He takes the opposite view of the case, and holds that the contract of life insurance was abrogated by the war, if the insurer and insured are citizens respectively of the opposing belligerents, and each domiciliated within the territory of the opposing belligerents.

His opinion contains an exhaustive review of the authorities, not only those precisely in point, but also those which bear upon the general question. We select for publication the principal case, because it is the opinion of five judges, before whom the case has been fully argued by able counsel and with full access to the authorities. We believe that the principal case cites all the reported judgments upon the question how far the contract of life insurance is affected by war, except the two we have just mentioned, and the case of Dillard v. Manhattan Life Ins. Co., 44 Ga. 119. This last case holds, like Tait v. The N. Y. Life Ins. Co., that the contract of life insurance was abrogated by the war; but the counsel do not appear to have cited any recent decisions bearing upon the question, and the opinion is very brief, and the subject does not appear to have received the attention at the hands of the court that its importance would warrant.

The reasoning on which Judge EMMONS proceeds is, that the keeping alive of such a contract is *beneficial to the public enemy*. This, it is admitted in the case of Sands v. The New York Mutual Life Ins. Co., 50 New York, 632, would terminate the contract, if such were the case; but this is denied, especially when the policy contains a provision rendering it void if the assured shall enter the military or naval service, or die in the known violation of any law of the United States. Where the policy contains such a provision, PECKHAM, J., argues (50 New York, 635) that its perpetuation would be *injurious* to the public enemy. Again, Judge EMMONS argues that the fact that the sum insured will not in any event be paid until after the return of peace, does not furnish any reason against the doctrine that such a contract is avoided by war; because, if continued, it remains "one of the most certain sources of future payment which could be placed in the hands of our enemies;" it constitutes "*present capital in the hands of the enemy.*" This argument is forcibly answered by Judge BLATCHFORD in Hamilton v. The New York Life Ins. Co., 9 Blatch. 249-50, as follows: "Nor is it perceived how the amount or value of a policy on the life of an alien enemy, who dies during the war, can be availed of to aid the war, by the government of the country of the assured, in any way, or to any extent, in or to which the amount or value of a *promissory note*, made before the war, and falling due during the war, can be availed of to aid the war, by the government of the country of its holder, while its maker continues to be an alien enemy. Yet it was never heard that the obligation to pay a note was, under such circumstances, or for such reasons, abrogated by a war."

Judge EMMONS' opinion places the question entirely, as we understand it, upon grounds of public law, and political duty. In the Georgia case (44 Ga. 122), the same conclusion is reached on a somewhat different ground. MCCAY, J., pronouncing the judgment of the court, reasons as follows: "It would have been *illegal* for Mrs. Dillard, [the wife of the insured,] to pay the premium to the company, during the war, contrary to the act of congress. And were this a case of *forfeiture* for a failure, we should hold that a forfeiture was prevented by the illegality of the performance of the condition. But is this such a case? The company contracts to pay so much at the death of the insured, if the annual premiums are paid as stipulated. It is clear from the policy, and from the known practice of all the companies, that the insured has a right, at any time, to refuse to pay, and give up his policy. The contract, upon its face, requires to be renewed from year to year, by the payment of the premium. Indeed, a contract of life insurance is, at best, nothing but an undertaking that the company will take the annual premiums paid, invest them safely, and pay the insured the product, after deducting the expenses of the business. Indeed, if every person insured lived to an average age, this would be exactly the contract. But, as any individual may die at any time, the company agree to pay him what his premium *would amount to*, making up its losses upon him by the payment of those who live beyond the average age. The regular annual payment of the premium agreed on is thus a condition *precedent* of the contract, and not a condition subsequent. And it is just here, that the authorities relied on fail to apply. If a condition subsequent becomes illegal, there is no forfeiture; for the estate having once vested, it shall not be divested because the party fails to do an illegal or impossible act. (Code, § 2680). But it is different with a condition precedent. If that be illegal, the right never vests. It is not a question of forfeiture, but a failure to do the thing necessary to acquire the right. (Brown's Leg. Max. 176.) And this, it seems to me, is a distinction based upon principles of justice and sound sense. If I promise a man to sell him my house, provided he appear on a particular day with the money, and he fails, for whatever reason, other than my fault, he has no right in the house. But if I sell him the house, and it is agreed that he shall forfeit it, if he fail to pay me for it in full, by a particular day, then the *cause* of his failure may, both in equity and sound sense, become very material!" On the other hand, in the case of Cohen v. The New York Mutual Life Ins. Co. 50 New York, 623, we find the following counter reasoning: "At the time of making the contract in this case, the plaintiff had the legal right and ability to make the annual payment, but the effect of the war was to make the attempt unlawful without any fault on his part. The operation of a condition as express and absolute as in this case, was held suspended during the war, in Semmes v. Hartford Ins. Co. (14 Wall. 158). The condition there, as here, was by the act and agreement of the party; and yet its performance being impossible, it was held to be inoperative."

The cases which hold that the contract of life insurance was not abrogated by the war, proceed chiefly upon the ground, that such a contract is in part *executed* by the payment of premiums; that by such payment, the beneficiary acquires a *vested right* in the benefits promised by the contract, of which he cannot be deprived by a casualty beyond his control, like the breaking out of a war. And some of the cases urge, in forcible language, that to hold the contract abrogated by the war, would be grossly unjust to the person for whose benefit the insurance is effected, and that such a defence on the part of the insurer, is an unconscionable defence. Thus, it is said in the Kentucky case: "To subject to forfeiture all the premiums paid, as well as the five thousand dollars for the loss of life, would be harshly and unreasonably penal, for no better cause than the inevitable non-precise payment of premium, which the law prevented the appellant from a right to receive." * * * "A suspension of the remedy, and not a dissolution of the contract, is all that is necessary, befitting or just." New York Life Ins Co. v. Clopton, 7 Bush, (Ky.), 184, 188. In the case in 9 Blatchford, the question is put by Judge BLATCHFORD in this way: "The defendants in effect say to Goodman (the insured): 'It was unlawful for us to receive from you your premiums for 1862, 1863, 1864 and 1865, as they became due; it would have been idle for you to have tendered them to us; yet, as the contract was that you should pay them at specified times, the contract is forfeited; our liability to pay you the $5,983.05 is at an end, and besides that, the $2,307.50 paid us as premiums on the policies of 1849, and 1858, is forfeited to us.' I do not believe a defence of that kind to a policy of life insurance situated like the present one, was ever allowed by any court of justice in any civilized community. I certainly shall not be the first judge to set a precedent of the kind." Equally strong is the language of ANDERSON, J., speaking for a majority of the court in the Virginia case, where he states the case thus: "They [the insurers] refused to receive the last premium when it fell due and was tendered, and now refuse to pay the policy because the premium was not paid; and, moreover, claim of the defendant in error a forfeiture of the premiums which he had paid, amounting to $5,155, besides interest; and they invoke the intervention of the court to sustain them in these pretensions." * * * "It would be a monstrous perversion of law, and repugnant to our every sense of justice, to say that this company, after having received more than half the sum assured, could, by this act, determine the policy, hold on to the money they had received, and say to their confiding victim, 'You may whistle to the winds for your merited reward, notwithstanding you relied upon our covenant and good faith to pay it.'"

And while the court admit that this language puts the case too strongly, yet they say further on, that the proposition that the company could withhold from the agent the printed receipts by which payment of the premiums was to be acknowledged, "would be to say that they could refuse to receive payment, and thereby release themselves from the obligation of the policy, and subject the assured to a forfeiture, without any default of his, of all the pre-

miums he had paid—a conclusion against which the sense of mankind would revolt."

These extracts indicate, to a partial extent, the reasoning of the courts on the subject. The result of the recent adjudications may be summed up, as follows:

1. The contract of life insurance is not abrogated, but only suspended, by the outbreak of a war which places the insurer and insured within opposing lines of belligerent occupancy. Smith v. Charter Oak Life Ins. Co., *supra;* Seyms v. New York Life Ins. Co., U. S. Circuit Court Southern District Miss. Nov. Term, 1873, (HILL, J.); Cohen v. New York Mutual Life Ins. Co., 50 New York, 610; Sands v. New York Life Ins. Co., 50 New York, 626; Manhattan Life Ins. Co. v. Warwick, 20 Grattan, 614, (two of the five judges dissenting); New York Life Ins. Co. v. Clopton, 7 Bush. (Ky.) 179; Hamilton v. New York Mutual Life Ins. Co., 9 Blatchford, 234. *Contra*, Tait v. New York Life Ins. Co., U. S. Circuit Court Western Dist. Tenn. (EMMONS, J.); Dillard v. Manhattan Life Ins. Co., 44 Ga., 119.

2. If the stipulated premiums are paid until the outbreak of the war, but not thereafter, and the assured die during the war, the beneficiary or legal representative may, by giving notice and making proof of death within a reasonable time after the close of the war, demand and compel payment of the sum stipulated in the policy, less the unpaid premiums accruing previously to the death of the insured, with interest. Sands v. New York Life Ins. Co., *supra*; Seyms v. New York Life Ins. Co., *supra;* Manhattan Life Ins. Co., v. Warwick, *supra*, (two of the five judges dissenting); Hamilton v. New York Mutual Life Ins. Co., *supra;* New York Life Ins. Co. v. Clopton, *supra*. *Contra*, Tait v. New York Life Ins. Co., *supra;* Dillard v. Manhattan Life Ins. Co., *supra*. And this principle applies to an insurance maintained by a *creditor* upon the life of his debtor. Manhattan Life Ins. Co. v. Warwick, *supra*.

3. If the insured survives the war, and within a reasonable time thereafter the unpaid premiums accruing during the war are tendered by him, and the insurer declines to receive the same, or to acknowledge the policy as in force, the beneficiary in the policy may maintain a bill in equity to reinstate the contract and declare the rights of the parties. Cohen v. New York Mutual Life Ins. Co., *supra*.

4. Or, under like circumstances, payment of the premiums having been tendered to, and refused by, the company's agent, during the war, the beneficiary may treat such refusal as a breach of the contract, and may maintain an action at law for damages; and the measure of damages is the value of the policy at the time of such breach of contract. Smith v. Charter Oak Life Ins. Co., *supra* (principal case.)

5. The relation of principal and agent between an insurance company residing within one of the lines of belligerent occupancy, and its agent residing within the other, is not terminated by the fact of war. Smith v. Charter Oak Life Ins. Co., (principal case) *supra;* Sands v. New York Life Ins. Co., *supra*. Hamilton v. New York Mutual Life Ins. Co., *supra;* Manhattan Life Ins. Co. v. Warwick, *supra;* New York Life Ins. Co. v. Clopton, *supra*. *Contra*, Tait v. New York Life Ins. Co., *supra*. And see Ward v. Smith, 7 Wall. 447, 452; United States v. Grossmeyer, 9 Wall. 72, 75. Provided, the agent had been appointed before the war. 7 Wall. 75.

6. And it is the *duty* of the insurer to provide an agent in the state where the premiums, by the terms of the policy are to be paid; and this duty continues, notwithstanding the intervention of war. Hamilton v. Mutual Life Ins. Co., *supra*.

7. Although an agent under such circumstances, would not have the power lawfully to enter into new contracts of insurance, [New York Life Ins. Co. v. Clopton, *supra;* Ward v. Smith, 7 Wall. 452], nor to transmit money received for premiums across the hostile lines to his principal: yet he might lawfully receive premiums on policies in force before the war, and such the insured might lawfully pay. Manhattan Life Ins. Co. v. Warwick, *supra;* Sands v. New York Life Ins. Co., *supra*. At least, a tender to such an agent, and his refusal to receive the premium because of his inability to transmit the same to his principal because of the intervention of a state of war, would save a forfeiture of the policy. Hamilton v. Mutual Life Ins. Co., *supra*.

8. Payment of premiums under such circumstances in *Confederate money*, is a good payment. Sands v. New York Life Ins. Co., *supra*. But the right of the company through its agent to refuse payment in such funds, is recognized in Manhattan Life Ins. Co. v. Warwick, *supra*.

The above summary and quotations give but a meager idea of the effect of the cases examined. The only object of this note has been to indicate, to some extent, the *judicial sentiment* on the question, and the grounds on which the courts have proceeded, as well as the chief points which have been ruled.

—THE attention of the Chilian congress had been taken up with the new penal code and the new educational act.

Warehouse Grain Receipts—Sale—Bailment.

PATRICK RAHILLY v. WILFORD L. WILSON, ASSIGNEE OF ATKINSON & KELLOGG.

United States Circuit Court, District of Minnesota, December Term, 1873.

Before DILLON, Circuit Judge.

1. **Grain in Elevators—Sale—Bailment.**—Where grain is stored in an elevator warehouse with the understanding implied from the known and invariable course of business, that it may be sold by the warehouseman, and that when the depositor shall be ready to surrender the receipt of the warehouseman therefor, the latter will give the highest market price or the same amount of grain of the like quality, but not the identical grain deposited nor grain from any specific mass, the transaction is a sale and not a bailment.

2. **Criteria** of sales and bailments stated.

This is appeal in bankruptcy from the decree of the district court, granting the relief prayed in the original bill of Rahilly, filed for himself and the other warehouse grain receipt holders, and dismissing the cross bill of the First National Bank of St. Paul.

The suit was brought in the district court to settle the title to twenty-one thousand five hundred bushels of wheat, or its representative in money, now lying in the registry of that court.

Geo. Atkinson & Co., and their successors, Atkinson & Kellogg, were engaged at Lake City as warehousemen and commission and forwarding merchants, during the fall of 1868, and up to December 8th, 1870, when they filed their petition in bankruptcy, and were adjudicated bankrupts.

The firm of George Atkinson & Co. was composed of George Atkinson alone until April 1st, 1870, when Kellogg became a partner. The old name was used until September, and was then changed to Atkinson & Kellogg, and so continued until their fail ure, at which time they had in their warehouse the wheat in controversy, which was taken possession of by the assignee in bankruptcy.

At the date of their bankruptcy, they had outstanding warehouse receipts issued to farmers to the amount of about thirty-five thousand bushels, representing Nos. 1 and 2 grades of wheat, and two receipts dated November 23, 1870, to the amount of twelve thousand bushels, issued as collateral security for the payment of three drafts given to pay an overdrawn bank account with their bankers, to the amount of ten thousand dollars. These two receipts were issued to the drawee named in the drafts, and they had been endorsed over to their bankers. They represented twelve thousand bushels of wheat, and are now held by the First National Bank of St. Paul, having come into its possession in the course of a transaction which will hereafter be mentioned.

The complainant, a farmer to whom some of these receipts had been issued in behalf of himself, and the others holding receipts to the amount of thirty-five thousand bushels, filed this bill against the assignee, and seeks to appropriate the fund exclusively to the payment of their receipts. The bank, by stipulation, is made a party defendant, has answered the bill, and also filed a cross bill, alleging that it has, to the extent of its claim, a prior right to payment out of the fund in court.

Both suits were heard together in the district court upon proofs taken.

The complainant, Rahilly, and other owners, on whose behalf he sues, held receipts in the following form:

Not good unless Countersigned by Warehouseman.

LAKE CITY, Minn . . . . 1869.

Warehouse of George Atkinson & Co.
Received *in store*, of P. H. Rahilly . . . . bush. No . . Wheat.

(Signed) GEO. ATKINSON & CO.,
. . . . . Per Atkinson.

The receipts issued by Atkinson & Kellogg, were similar, with

the addition of the words "subject to warehouse charges and advances," and an omission of the words "in store."

The proofs show that Atkinson & Kellogg were the owners of an elevator in Lake City, constructed in the usual manner, for the purpose of receiving, storing and discharging grain—the elevating machinery being propelled by steam. There are several similar buildings in the same city, and the proofs show that business in them is conducted in the same general manner. The wheat is brought in by the farmers and is either purchased and paid for at the time by the proprietors of the elevators, or received by them and receipts issued therefor, like the one above copied.

Wheat is classified or graded into what is termed No. 1, No. 2, and rejected. Wheat when received in either mode, is tested, graded, and put into a common bin, each grade being kept distinct, but all of the same grade is mingled together, and this is the invariable practice and known to be so. The warehousemen do not keep the identical wheat on hand for which receipts are issued, but sell and ship at their pleasure: at least, the evidence shows that this is the general practice. The receipts specify *no time for the delivery* of the wheat to the depositor, but the usage or custom is that the holder may select his own time for presenting them, and demand either the market price of the grain on that day, *or* the quantity and quality of grain called for in the receipt. It is expected that the ticket-holder will give the warehousemen who issued it the first privilege of buying, if he will pay as much as the holder can obtain elsewhere. In the event the holder sells to the warehouseman, the latter receives no storage, unless the grain has been carried over the winter; but if he demands grain, or if he sells the receipt to others, who demand grain instead of the market price or value, then the practice is to charge storage. The evidence shows that it seldom happens that the depositor demands grain, but almost invariably elects to take the money, that is the highest market rate of the grade of grain mentioned in the receipt on the day when he closes the transaction and surrenders the instrument. The warehouseman often makes advances on these receipts, charging interest.

The bankrupts, in addition to receiving wheat of farmers and issuing storage tickets as above, also purchased wheat for themselves under an arrangement with Eames & Co., of St. Paul, whereby the latter were to allow them a commission or compensation for their services, of two cents per bushel. Wheat thus purchased was paid for by the bankrupt's own checks on local banks, and the bankrupts reimbursed themselves by drafts drawn from time to time on Eames & Co., on account of wheat shipped to them. All wheat thus purchased was graded and put into its proper bin, mingled with wheat for which receipts or tickets were issued; and when shipments were made, the grain was taken from the amount in the elevator building. As wheat was being constantly received and constantly shipped, the amount in the elevator fluctuated from week to week. In the summer of 1870, before the new crop of that year came in, the bankrupts' elevator was entirely cleared of grain, although many of their receipts, issued in 1869, were then outstanding.

The storage capacity of the bankrupts' warehouse was about 60,000 bushels, although the amount of wheat which was received, handled and discharged therefrom in a year largely exceeded this amount.

When they failed they had on hand 21,500 bushels of wheat, of which about 18,000 had been purchased within a week previous to the failure and mixed with grain then in the building. To pay for this 18,000 bushels, the bankrupts drew checks on their local bankers, Williamson & Co., and between the 15th and 17th of November, 1870, drew in favor of these bankers three drafts on Eames & Co. for $10,000, which were dishonored and returned to Williamson & Co., who demanded warehouse receipts as security, and on the 23d day of November, when it was known that the bankrupts had stopped business, and were in failing circumstances, the bankrupts issued two warehouse receipts for $12,000, which afterwards came into the hands of the First National Bank at St. Paul, as collateral security, with full notice of all circumstances.

The district court held that this transaction was an attempt on the part of Williamson & Co. to obtain from the bankrupts an illegal preference, contrary to the bankrupt act, and that the St. Paul bank was affected with notice thereof, and it accordingly dismissed the cross-bill of the last named bank, but decreed that the ordinary receipt holders were entitled to the grain on hand at the time the petition in bankruptcy was filed. From the decree dismissing the cross-bill, the St. Paul bank appeals, and from the decree on the original bill, the assignee in bankruptcy appeals.

E. C. Palmer & James Gilfillan, for the assignee; *George L. Otis*, for the first National Bank of St. Paul; *Bigelow, Flandrau & Clark*, for the complainant, Rahilly.

DILLON, Circuit Judge.—The proofs satisfy me that the invariable and known course of business at the elevator warehouses in Lake City, was to mingle together all grain of the same grade, whether purchased outright and paid for at the time, or received on tickets specifying the grade and quantity, and which contemplate the future delivery of the like amount of the same grade of wheat to the holders of such receipts when they should call for it, or the payment in money of the value of that amount and quality of grain. Those who deposited wheat must be taken to know, and in fact did know, that it would be thus mingled with other grain; that it would be shipped and sold by the warehousemen, when the latter should deem it to be for their interests (for such was the uniform practice) and consequently if the depositor should demand wheat instead of the value of the wheat, he would not receive, unless by accident, any of the identical wheat deposited, nor any of the immediate mass into which it went. As wheat was being daily received and constantly shipped, the amount on hand fluctuated from time to time. In July, 1870, there was not a bushel of wheat in the elevator building, although many receipts for the crop of the previous year, or years, were outstanding. The proofs show that it was very unusual to deliver wheat to the depositor, as he almost always chose to take the value of the amount and quality called for in the receipt at the date when he desired to surrender it and close the transaction.

Under these circumstances the question is, what is the relation which exists between the grain depositor and the warehouseman? Is the depositor a bailor, simply, and the warehouseman a bailee, or is the former a seller, and the latter a purchaser, of the wheat? The district court held the former theory, and that the holders of outstanding receipts were entitled to the grain in the warehouse at the time of the failure of the bankrupts, and that as the amount therein did not equal the amount called for in the outstanding receipts, they must share *pro rata*. This view proceeds upon the ground that the title in the grain deposited, does not pass to the warehouseman, but remains in the depositor, and that the latter has the title at all times to an amount of wheat in the warehouse equal to that called for in his receipt; and it is contended that if sales are made by the warehouseman, this is a conversion of the depositor's property, and if other like property is placed in the warehouse, the law will imply that it is placed there in substitution for that which was wrongfully removed, and hence that the grain at any time on hand belongs to the depositors to the extent of their receipts of tickets. It seems to me that this view cannot be maintained, and that it would lead to difficulties and confusion, and that it is against the established legal principles by which sales and bailments are discriminated. If this view is sound and the warehouse should burn without the fault of the owner, this would be a defence to any demand on the part of the ticket holder either for the wheat or its value—a proposition which cannot, I think, be maintained, and which is against the precise point adjudged in several well-considered cases. (Chase v. Washburn, 1

Ohio St. 244, 1853; The South Australian Ins. Co. v. Randall, Law Rep. 3 Privy Council Appeals, 101, 1869.)

Viewed in the light of the uniform course of business, the contract is not one of bailment proper, but one (*mutuum*) where the property passes to the mutuary or receiver, and is delivered to him for his own use or consumption, and where he is not bound to return the identical article in its original or altered shape, but property of the same kind and value; in which case it is a sale, and the title passes, and the receiver becomes a debtor for the stipulated return. (Jones on Bailments, 64, 102; Story on Bailments, sec. 439; 2 Kent's Com. 590.)

That this is a correct view of the relations between the wheat depositors and the bankrupts is expressly adjudged in the following cases which, in their facts, are identical with the one under consideration. (South Australian Ins. Co. v. Randall, *supra;* Chase v. Washburn, *supra,* Lonergan v. Stewart, 55 Ill., 44, 1870; Johnson v. Brown, *infra.* See Myers v. Adams, 8 Nat. Bankr. Reg. 214; Stearns & Raymond 26 Wis. 74.)

Applying the principle above mentioned, the privy council in the case of the South Australian Insurance Co., in an elaborate judgment, decided, where corn was deposited by farmers with a miller to be "stored," and used as part of the current or consumable stock or capital of the miller's business, and was by him mixed with other corn deposited for a like purpose, subject to the right of the farmers to claim at any time, an equal quantity of corn of the like quality, without reference to any specific bulk from which it is to be taken, or in lieu thereof, the market price on any equal quantity, on the day on which he made his demand, with a small charge for general purposes; that the transaction was a *sale* by the farmer to the miller of the corn deposited, and not a bailment. In giving their lordship's judgment, Sir Joseph Napier says: "It appears to their lordships that there is no sound distinction, in principle, between this, and the case of money deposited with a banker on a deposit receipt; * * * that it is not the case of a possession given (by the farmer) subject to a trust, but that it is the case of property transferred for value, *at the time of delivery*, upon special terms of settlement. Law Rep. 3 Privy Council Appeals 109, 113.

And so the supreme court of Iowa, in a case yet unreported, (Johnson v. Brown, Oct. 1873,) has also held. In the case just cited, wheat was left in an elevator with the understanding that when the depositor should be ready to sell it, the proprietor of the elevator would give the highest market price or the same amount of wheat of like grade and quality — the custom being to ship off grain, but to keep on hand sufficient to fill outstanding storage receipts, but not the identical wheat received — and it was adjudged that the transaction was a sale and not a bailment.

I regard the case at bar distinguishable from Young v. Miles, 20 Wis. 6 5, 23 Wis. 643; and Kimberly v. Patchin, 19 N. Y. 330; and like cases where the bulk from which the mingled articles were to be taken was specific and not subject to constant fluctuations.

I am of opinion, therefore, that the court erred in holding that the receipt owners had the right to the wheat in the warehouse as against the assignee, and its decree in this respect is reversed, and a decree will be entered here dismissing the bill.

I may add, that I am entirely satisfied, in view of the mode of conducting business at the grain elevators, as shown in the testimony, that the foregoing is a sound view of the relation between the grain depositor and the proprietor of the elevator, and that legislation to protect the former against the insolvency of the latter, would appear to be called for.

In respect to the claim of the bank upon the two wheat receipts for 12,000 bushels, made by the bankrupts after their failure to secure $10,000 to their local bankers, I concur so fully in the views of Judge NELSON that I do not deem it essential to do more than refer to his opinion. The decree of the district court, dismissing the cross-bill of the bank is affirmed. The cause will be remanded to the district court with directions to tax the costs in that court equitably as between the receipt holders and the bank. The costs on this appeal will be borne equally between the same parties.

ORDERED ACCORDINGLY.

NOTE.—In Chase v. Washburn, 1 Ohio St. 244, the receipt of the warehouseman, was: "Milan, O., Nov. 5, 1847. Rec'd *in store* from J. C. W. thirty bushels of wheat. H. Chase & Co." The evidence *aliunde* showing that the wheat was received with an understanding that the warehouseman might dispose of it, and that, upon demand, he would return other grain, *or* pay for that deposited, the transaction was adjudged a sale and not a bailment, and therefore it was no defence to the warehouseman that his warehouse was destroyed by fire at a time when it contained wheat enough to answer all his outstanding receipts.

So, in the case of the South Australian Ins. Co. v. Randell, Law Rep. 3 Priv. Council App. 101, 6 Moore P. C. N. S. 341, as in the case to which this note is subjoined, the receipts issued to the farmers by the miller were "to store," and under the circumstances stated in the foregoing opinion, the transaction was considered to be a sale.

In 6 Am. Law Review, 450, the reader will find a valuable article entitled "*Grain Elevators: the title to Grain in Public Warehouses.*" The case of Chase v. Washburn is there printed in full, and is selected "as presenting the ablest exposition of the opposite opinion" to that which the annotator there maintains to be the true doctrine. In that note is cited, perhaps, every reported case on the subject of the title to grain in elevators which had been decided down to April, 1872. The substance of that note will be found condensed in Holmes' edition of Kent's Commentaries. 2 Kent Com. 12th ed. 590.

The case of Rahilly, *supra*, is one where there was an understanding implied from the known and invariable course of business, that the warehouseman might mingle the specific wheat deposited with other wheat of like quality, and dispose of it at his pleasure, with the further understanding that on demand, he would pay the depositor the highest market price, or deliver the same amount of grain of a like quality, but not the identical grain deposited, nor grain from any specific mass. We have found no adjudged case which holds such a transaction to be a bailment, but there are several directly to the point that it is a sale. Such a case is obviously distinguishable from that of a specific deposit which is not to be changed by the warehouseman, but retained by him until called for by the depositor. This is a bailment. And the case is distinguishable, also, from those where specified amounts of grain of different owners is mixed by consent in specific mass, without any understanding that the warehouseman might dispose of the grain so deposited and mingled. And it may be different from the case where the proprietor of the elevator is a mere warehouseman and where his course of business is, and his duty is, always to keep on hand in the elevator sufficient grain to meet all outstanding receipts, though not the particular grain received. We say it *may* be different from such a case, but it is doubtful whether it is so. See Johnson v. Brown, Iowa Sup. Ct., 1873. But where it is known by the depositor that the warehouseman is himself buying and selling grain on his own account, and also receiving grain "in store," and that he intermingles all that is so obtained, and is constantly buying, receiving and selling, so that the mass is continually fluctuating, and there is no fixed time when the receipts are to be presented, it seems impossible to consider the holders of the outstanding receipts as tenants in common of the whole mass of wheat in the elevator in proportion to the amount of their receipts. And such a case seems to be the same in principle as an ordinary general deposit of money in bank; it creates simply the relation of debtor and creditor; and so the Privy Council in the case of the Australian Ins. Co., above cited, considered it.

The very recent case of Butterfield v. Lathrop, 71 Pa. St. 225, goes upon the same principle. Here, Baxter and numerous other farmers delivered milk to a cheese factory; each was credited with the amount of his milk, and all was manufactured together; the company sold all the cheese; each farmer was charged with the expense, and received his share of the proceeds in proportion to the milk furnished; Baxter's interest in the cheese, etc., was sold under an execution against him. *Held*, that the sale by the factory converted his interest into a money demand, and this interest was, therefore, not the subject of a levy. The arrangement at the factory did not constitute the farmers partners nor tenants in common in the cheese; nor was there an agency or bailment as to the particular milk delivered. It was a sale of milk to be paid for in a certain time and manner.

On the general subject see and compare Cushing v. Breed, 14 Allen, 376 Warren v. Milliken, 57 Maine, 97; Dale v. Olmstead, 36 Ill. 150; 2 Kent Com., 12th ed., 590, and cases cited in Mr. Holmes' note.

—A COMPULSORY EDUCATIONAL BILL has passed the lower house of the Illinois legislature.

Bankrupt Act—Lien Created by State Law—Deposits by Savings Banks in other Banks.

In re STUYVESANT BANK.

District Court of the United States for the Southern District of New York.

Before BLATCHFORD, District Judge.

Bankrupt Act--State Law creating Priority.--A state law which allows a savings bank to make, under certain restrictions, deposits in another bank, and provides that in case the bank receiving such deposits becomes insolvent, its directors shall, after providing for the payment of its circulating notes, apply its assets to the payment of such deposits, does not create a lien, nor is a lien created simply by the making of such deposits in pursuance of such statute, which is ehforceable under the bankrupt act.

In bankruptcy. The facts are stated in the opinion.

T. Hughson, for the New York Savings Bank; *D. Noble Renan*, for the Sixpenny Savings Bank; *F. N. Bangs*, for the assignee in bankruptcy.

Extract from the opinion of the court—BLATCHFORD, J.—The second section of the act of the legislature of the state of New York, passed April 15, 1853 (Laws of 1853, chapter 257), provides that it shall be lawful for any savings bank or institution for savings, in the city and county of New York, then chartered, or that might be thereafter chartered, "to make temporary deposits in any bank or banking association to an amount equal to ten per cent. of the actual cash capital stock paid in of such bank or banking association, and to receive interest thereon at such rates, not exceeding that allowed by law, as may be agreed upon; provided that all the deposits in any one bank or banking association shall not exceed in amount twenty per cent. of all the deposits belonging to such savings bank or institution for savings, and that no contract or agreement in relation to said deposits shall be for a longer period." The third section of said act provides that "it shall not be lawful for any such savings bank or institution for savings to make any loans to any bank or banking association exceeding the limits above prescribed, unless such savings bank or institution for savings shall require and receive of such bank, for all sums so deposited exceeding the limits above prescribed, such securities therefor and equal in amount as the comptroller or superintendent of the banking department is now lawfully authorized to receive in exchange for bills or notes for circulation." The fourth section of said act provides that "all the assets of any bank or banking association now or hereafter to be created, that shall become insolvent, shall, after providing for the payment of its circulating notes, be applied by the directors thereof, in the first place, to the payment of any deficiency that may arise on the sales of the securities aforesaid, and thereafter, of any sum or sums of money deposited with such bank or banking association, by any savings bank or institution for savings, within the range of twenty per cent., as provided in the second section of this act." The first section of the act of the legislature of the State of New York, passed April 10, 1858 (Laws of 1858, chapter 136), provides that the temporary deposits which any savings bank or institution for savings in the city and county of New York is authorized to make, by the second section of chapter 257 of the Laws of 1853, shall not exceed in amount twenty per cent. of all the deposits belonging to any such bank or institution for savings, nor shall the deposits of any such bank or institution for savings, in any bank of issue, exceed in the aggregate, at one time, the sum of $100,000.

The Sixpenny Savings Bank of the city of New York, a savings bank in the city and county of New York, chartered by the state of New York as a corporation, has proved against the estate of the bankrupt a claim for the sum of $23,261.06, with interest thereon at the rate of five per cent. per annum, from the 11th of October, 1871. In its proof of debt it claims that, under the said two acts, it has a valid and just lien on the estate of the bankrupt, and is, in the distribution and division of said estate, entitled to a preference or priority of payment to any creditor of the bankrupt, other than the New York Savings Bank, on the ground that the said moneys were deposited and loaned under the express agreement that the Sixpenny Savings Bank should be entitled to such priority under the said two acts, and that the said two acts entered into and formed a part of the contract under which said deposit or loan was made to the bankrupt.

The New York Savings Bank, a savings bank in the city and county of New York, chartered by the state of New York as a corporation, has proved against the estate of the bankrupt a claim for the sum of $20,020.41, with interest thereon at the rate of seven per cent. per annum, from the 12th of October, 1871. In proof of its debt it claims that under the said two acts, and its agreement with the bankrupt thereunder, and in pursuance thereof, prior to the insolvency of the bankrupt or any suspension thereof, it is entitled to have its said claim paid in full out of the assets of the bankrupt, before any payment is made to other creditors not entitled by law to a preference. Assuming that all or some parts of the amounts of these claims fall within the terms of the provisions of the state acts, the question arises whether the priority or preference claimed under the fourth section of the state act of 1853, can be allowed in the distribution of the assets of the bankrupt. It is contended on the part of the savings banks that, by virtue of the agreements made by them with the bankrupt under and within the provisions of the state acts, they acquired a lien on all the assets of the bankrupt, in case of insolvency, and are in the distribution of the proceeds of its assets, entitled to the same preference and priority of payment over its general creditors, to which they would have been entitled if its assets had been distributed under the state laws; that the provision of the fourth section of the state act of 1853, is not an insolvent law; that it contemplates a lien on the present and future assets of the bank; that all liens are made in contemplation of insolvency in the same sense as the lien created by the said fourth section; that the bankruptcy act preserves all liens, both legal and equitable, and all charges or encumbrances, and except in cases of fraud on the act, gives to the assignee in bankruptcy only such rights and interests in the estate of bankrupt as the bankrupt had or could assert; and that the rights acquired by the savings banks under the state act, were rights of property, in the form of contracts, constituting equitable liens, which can be enforced against the estate of the bankrupt in the hands of the bankrupt, in case of insolvency, if there had been no proceedings in bankruptcy.

I have given much consideration to the question involved, especially in view of the fact that, at a prior stage of these proceedings, I indicated an opinion in support of the claims of the savings banks, when the question was submitted to me on written briefs. But an oral re-argument, and a full consideration of the provisions of the bankruptcy act have led me to the conclusion that these claims cannot be allowed. I do not think that these claims can, under the terms of the state act, be properly considered as rights of property, inhering in, or adhering to the property of the bankrupt. The savings banks, it is true, made contracts with the bankrupt, but these contracts were merely contracts for the making of deposits and the paying of interest thereon. No part of the state act gives any lien for such deposits on any assets of the bankrupt. Those assets, consisting in part of the moneys so deposited, could be dealt with and disposed of by the bankrupt, free from any lien, charge or encumbrance thereon arising out of such contracts. No provision of the state act purports to interfere with the disposition of the assets of the bankrupt until insolvency occurs, and then a rule for the application of such assets in the distribution of the estate of the bankrupt as the estate of an insolvent debtor, is created by the fourth section of the state act of 1853. But that rule establishes in favor of the savings banks no such interest in the property of the bankrupt, that such

property passes under the bankruptcy act into the hands of the assignee, subject to such interest. * * * The twenty-eighth section of the present act provides that certain claims shall "be entitled to priority or preference and to be paid in full in the following order." Then follow five clauses. The fifth is, "all debts due to any persons who, by the laws of the United States, are or may be entitled to a priority or preference, in like manner as if this act had not been passed." This is limited to priorities or preferences created by the laws of the United States. It does not extend to priorities or preferences created by the laws of a state. Under it the state could have no priority for debts due to it which were not liens or securities, and but for the provision, in the third class of priorities, for such debts due to the state, there could be no priority for such debts. * * * But such priorities or preferences created by state laws in the distribution of insolvents' estates are not liens or securities, or rights or interests in property. If so, they are not saved by the general scope of the bankruptcy act, and they are not recognized by the twenty-eighth section. The claims to priority on the part of the savings banks must be disallowed.

Sale—Attachment of Goods in Transitu—Attachment of Interest of Partner or Joint Owner.

ROLFE S. SAUNDERS v. BARTLETT, GOULD & HEATH.

Supreme Court of Tennessee, Jackson, Special November Term, 1873.

Hon. A. O. P. NICHOLSON, Chief Justice.
" P. TURNEY, }
" ROBERT MCFARLAND, }
" JAMES W. DEADERICK, } Judges.
" JOHN L. T. SNEED, }
" THOMAS J. FREEMAN, }

1. **Consignor and Consignee—Attachment.**—Where a debtor ships goods to his creditor, agreeing with the latter that he shall receive and sell the goods and apply the proceeds to the payment of the debt, such goods may be attached by another creditor, although they have reached their place of destination, and although the bill of lading may have reached the first creditor, if he has not actually taken possession of the goods. Such a transaction is not a sale, and the title remains in the consignor until actual or constructive possession by the consignee; and the delivery of the bill of lading is not such constructive possession.

Attachment of partnership goods for debt of partner or joint owner.—An attachment in a suit against a partner or joint owner may be levied upon goods belonging to the firm or joint proprietors, and the levying officer is entitled to the possession of the goods as against a third person who claims them.

FREEMAN, J.,—Joyner & Son were indebted to defendants, and agreed, or it was understood, that said Joyner & and Son should ship their bale of cotton in this case to defendants, and when sold, its proceeds should be appropriated by them to the payment of the debt. The cotton, says the bill of exceptions, was shipped to Bartlett, Gould & Heath, as cotton factors, for sale. When the boat on which it was shipped, arrived at the wharf at Memphis, the bill of lading was sent to Bartlett, Gould & Heath, but before anything was done by them to reduce the cotton to possession, it was attached by Saunders, or at his suit, when the factors replevied it in this suit. We take it to be clear, that the consignors were the owners of this property; it was not a sale; and that the factors had no lien, either general or special, on the cotton, without actual or constructive possession. The possession of the bill of lading was not such possession in this case, but only gave the authority to reduce the cotton to possession as consignee. See. 2d. Head, 94. The case of Kinloch v. Craig, 3d Term Rep. 119, cited and approved by Judge WRIGHT in 2d Head., was a much stronger case than the one now under consideration, yet it was held that the rights of consignee had not attached.

The next question presented by counsel is, that the attachment was against Rodney Joyner, Jr., the second member of the firm, and not against the firm, and that, therefore, the sheriff was a trespasser, not having the right to take possession of the property. This question is one of more or less difficulty, as the authorities are contradictory on the subject. Assuming that the owners were partners, it presents the question as to whether the sheriff can levy an attachment against one of the partners, on the property of the firm, and take possession by virtue of such levy. We think it settled in Tennessee, that he may do so in case of an execution, but he can only *sell* the interest of the partner against whom the process is issued. Haskins v. Everett, 4 Sneed, 531. The same doctrine was laid down in a case of joint ownership in the case of Rains v. McNairy, 4 Hum. 356, Such seems to be the weight of authority in most of the other states of the Union, as well as in England. In fact, it would seem to follow as a matter of necessity, from the principle of allowing the interest of the partner to be sold or taken at all under process against him. See 1st Amer. Lead. Cases, 382-3-4, Ed. 1871. We, therefore, hold that the attachment might properly be levied on the interest of Rodney Joyner, Jr., whether he was partner or joint owner, and the sheriff was properly in possession of the cotton, and that plaintiff below did not have the right to possession as against said officer.

We see no error in the charge. So far as it goes it is correct. It might have been fuller on the questions presented, but no request was made for any additional instructions.

Let the case be REVERSED.

Title to Grain in Public Elevators.

At the instance of several bankers we publish elsewhere in this number the opinion of the United States circuit court for Minnesota, as to the nature of the relation which exists between the depositor of wheat in a public elevator and the proprietor of the building. Such elevators are very numerous, and a large portion of the grain business of the country is transacted in them. It is the practice to issue to the depositor a warehouse receipt, and these receipts are sold and extensively used as collateral security. The nature of warehouse receipts proper is well understood. In cases of bailment, they represent the property bailed, and their transfer passes the title to it. (Gibson v. Stevens, 8 How. 884; McNeil v. Hill, Woolw. C. C. R. 96; Harris v. Bradley, 2 Dillon C. C. R. 284.)

The case of Rahilly presents some different considerations; and is said to have occasioned some surprise to business men who have, perhaps not unnaturally, regarded *all* grain warehouse receipts as standing upon the same footing.

According to the views propounded in the opinion in Rahilly's case, whether the deposit of grain in a public elevator amounts to a bailment or a sale depends upon the nature of the transaction, to be inferred, in the absence of express agreement, from the usual and known course of business. As business at these elevator warehouses is generally conducted, the transaction, in most instances, assuming the correctness of the decision in Rahilly's case, is a sale, and hence these receipts in such cases represent only the personal responsibility of the warehouseman. If this is so, it would seem that the subject is a fitting one for legislative protection to the grain depositor, by requiring the elevator proprietor to give security to the public for the benefit of his receipt holders, or in some other manner to guard them against loss.

Similar principles would apply to cotton in store. If the specific cotton is to remain in store with no power of sale in the warehouseman, it would be a bailment; but otherwise, a sale. Whoever would have a full understanding of the objections which may be urged against the doctrine of Rahilly's case, should read Judge Nelson's opinion in the same case in the court below, published at the time in the Chicago Legal News, and particularly the article in the American Law Review on Grain Elevators. (Vol. 6, p. 450.)

Book Notices.

COMMENTARIES ON AMERICAN LAW. By JAMES KENT. 4 vols. 12th Edition. Edited by O. W. Holmes, Jr., of Boston: Little, Brown & Co. 1873. Sold by Soule, Thomas & Wentworth, St. Louis.

We have delayed to notice this edition of Kent until we could find time carefully to examine it. A comparison with preceding editions has satisfied us of its superior accuracy, fullness and value.

It is needless to enlarge upon the unequalled merits of this great and crowning work of the chancellor's life. It will perpetuate his fame to the latest times. In every respect it equals, and in some respects it surpasses, the similar work of the great English commentator. It is a noble monument to the ripe learning, the cultivated literary taste, and the wisdom that came from the long and varied judicial experience, of its illustrious author.

Unless Mr. Justice Story forms an exception, Chancellor Kent has done more than any American lawyer to make the jurisprudence of our country known and respected throughout the civilized world. In natural endowments, Marshall was the equal of either of them, and perhaps their superior, and in his long career on the Supreme Bench of the United States, he rendered services in the settlement of constitutional questions, whose value to the country are incalculable; but his name, unlike that of Story and Kent, while it is a household word in America, is not familiarly known to the lawyers of Great Britain or of Europe. The highest title of Chancellor Kent to lasting veneration, is not in his Commentaries, but in his long and arduous life upon the bench, where, almost unseen by the public eye, he gave to private suitors the benefit of his learning, wisdom, and disciplined judgment. The popular fame of the great chancellor rests however, rather upon these Commentaries than upon his Judgments contained in thirty volumes of Law and Chancery reports.

These Commentaries, it is well known, were written after the chancellor's retirement from the bench by reason of his having reached the constitutional limit then in force as to age. The first volume appeared in 1826. The author lived to correct the sixth edition. Previous to the present, five editions have, from time to time, appeared since the author's death. The present is the twelfth; and it sums up the result of a critical examination of it, to add that it is, in our judgment, the best. Since the author's death, the work has had several editors, and the notes had become cumbrous and frequently confused, and inserted without method.

We approve the plan of the present editor, which adopts the text and notes as Chancellor Kent left the work in the sixth edition, and keeps these strictly and visibly separate from the editorial additions. The great and almost authoritative weight which belongs to the opinions of the author, makes it very desirable that there should be no confusion as to what is his and what is not.

We think, also, the editor did wisely to reject, with but two exceptions, the mass of notes, which accompanied the former editions since the sixth, and to edit the work *de novo*, as this has enabled him to systematize and harmonize the editorial additions.

It is an arduous and difficult task to perform thoroughly and well the work of editing the four volumes of Kent, covering, as they do, almost the entire field of jurisprudence except criminal law. Since the author's death, a quarter of a century has elapsed, and it is quite needless to remind the reader how great, in the meantime, have been the changes, and how great have been the additions, both by enactment and adjudication, to the body of the law as it then existed. Obviously, the cardinal duty of the editor is to note these changes and additions, so as to make the work exhibit the law as it exists to-day. To do this thoroughly, methodically, without diffuseness, and yet with sufficient fullness, keeping faithfully within the scope of the original work, and not smothering it with the weight of the additions, requires patience, industry, skill, and good judgment. We find evidence of the presence and careful touch of the present editor in almost every page. After an attentive examination of his labors, we readily credit his statement that they have taken more than three years of his time. His editorial management of one of the leading law journals of the country had well prepared him for work of this character. Bearing the weight of an illustrious name, and animated, doubtless, by a noble ambition to justify the expectations it excites, he has given the profession an amount of faithful, carefully considered work that would not be likely to originate in motives any less cogent; which, we trust, will be appreciated, and which, at all events, demonstrates his various learning, capacity and unflagging industry.

We do not deem it necessary to go into much detail to verify the statements we make concerning the thoroughness with which the work has been brought down to date. The reader will find it illustrated, if he will open the first volume which treats of the Law of Nations and of War, and the Jurisprudence, Federal and State, of the United States. All the important decisions which have grown out of the late rebellion are carefully stated and properly arranged.

Two or three examples will suffice to show the manner in which Mr. Holmes has done his work. An important topic at the present time is the law concerning the removal of suits from the courts of a state to those of the United States. When Chancellor Kent wrote, the 12th section of the judiciary act was the only enactment of congress upon the subject, and he refers to but one decision. The present edition (vol. 1, p. 303), in a condensed note cites the very numerous decisions since made, and gives the points they establish. Another example: Chancellor Kent states (vol. 1, p. 410) that "if a marshal of the United States, under an execution in favor of the United States against A., should seize the property of B., the state courts have jurisdiction to protect the person and the property so illegally invaded." The editor is careful to note that the Supreme Court has twice denied this statement to be law, and refers to the many decisions touching the respective jurisdiction and powers of the federal and state tribunals. Another example: in the Lecture on Bailments (vol. 2, p. 590), the editor in a note that displays his industry and power of condensation, and which to a lawyer who should have occasion to investigate the subject, is alone worth the price of the work, discusses the question whether the deposits in grain elevators are bailments or sales, and the nature of purchases of grain therefrom. We had occasion recently to look for the cases upon this subject, and after several days' search, we discovered only a portion of those here cited, and none which are here omitted. Among other improvements, we are indebted to the present editor for subdivisions of the chapters, indicated by full-faced type; for an improved index, and for presenting all the cases cited in one table. No previous edition equals this in the style in which it is published.

Notes and Queries.

MORGANTOWN, KY., January 28th, 1874.

EDITORS CENTRAL LAW JOURNAL: My object in writing this, is to ask you a question, viz: C. held a policy of insurance, by assignment from H.; but before the assignment was ratified by the company, the house insured was destroyed by fire. C. then placed his policy in the hands of F. as special bailee. F. was sub-agent of the insurance company, and without authority, and against the order of C., surrendered the policy to the company. C. brought an action of replevin against F. to recover the policy.

Can F., as a matter of defence to C.'s action, prove that the policy was worth to C. less than the amount of insurance? or, in other words, can he prove that C. could recover nothing on the policy from the company, and that it was consequently worthless. L. J. S.

ANSWER.—The right to maintain replevin in such cases and what defences may be made to the action, may depend so much upon the local legislation and practice, that we feel scarcely warranted in making a specific answer to our correspondent's inquiry. See in Iowa, Savery v. Hays, 20 Iowa, 25, and cases there cited. As to replevin for public records and papers, see Parish &c. v. Stearns, 21 Pick. 148; School District v. Lord, 44 Maine, 374. *Contra*, LaGrange v. State Treasurer, 24 Mich. 466. Compare Desmond v. McCarty, 17 Iowa, 525.

GRANT CITY, MO., January 10, 1874.

EDITORS CENTRAL LAW JOURNAL: If you will, you may explain how homesteads of widows and children become a vested fee in the widow when the children attain their majority, subject to be disposed of by her in such a way as to defeat their reversionary interest. I am placed in this dilemma by Kelly in his Chapter on Homesteads, Probate Guide, pages 361 and 362, while section 1 and 2, chap. 130, G. S., seem to me to conflict with his opinion. W. J. G.

ANSWER.—There appear to be no decisions in this state illustrating the question; and professional opinion here (at Saint Louis) is somewhat divided as to the construction of the 5th section of our homestead law. By some, it is regarded substantially as a statute of *descents*, vesting in the widow the fee or whatever estate the husband had, subject to an incumbrance, namely, the right of the children so long as they re-

main in their minority, to an occupancy in common with the widow. According to this theory, upon the youngest child becoming of age, the fee (or whatever estate the husband possessed) becomes an absolute estate in the widow, which she may alienate at pleasure, and which, upon her death, descends *to her heirs* and not to the heirs of the husband. Upon the happening of this event, if this view be the correct one, the estate becomes *by operation of the statute*, a vested fee in the widow, subject to be disposed of by her so as to defeat the reversionary interest of the children, in precisely the same way as *any other heir* takes the estate of his or her ancestor by virtue of the statute of descents. In other words, in this view of the statute, the wife is simply the heir of the husband in respect of the homestead property, subject to the incumbrance before mentioned.

But is this the correct view? Other members of our bar (and some of our judges) are of opinion that the statute is not a statute of *descents*, but a statute of *exemptions* merely; that its object and policy are simply to prevent creditors from sweeping away the homestead and pauperizing the family, and that when this object is attained, the whole force of the statute is discharged. According to this view, the wife, upon the death of the husband, takes a possessory interest merely in the homestead property, which she holds during her life, subject to the right of common user of the children during their minority; she may not alienate it during the minority of the children, so as to deprive them of this right of common user, nor after their majority, so as to defeat their reversionary interest; and upon her death, it passes under the general statute of descents, *to the heirs of the husband*. In opposition to the view that the widow takes the fee, it is urged that upon the death of the widow without issue, the estate would pass to her collateral relatives—an injustice to children which the husband may have had by a former marriage, which the legislature never could have intended. And it is hence urged, that when the law has succeeded in securing a homestead to the widow and minor children, not subject to be taken for the debts of the husband, the boundaries of the legislative intent are reached; and that it is a perversion of the statute to go beyond those boundaries and interpret it as changing the general statute of descents, altering the rights of widow and children *inter se* thereunder, and perhaps disinheriting the children of the husband in favor of distant relatives of the wife.

Without expressing any definite views of our own upon the question, we would say that our homestead law, G. S. ch. III.; 1 W. S., ch. 68, is copied from the Vermont, act, of 1855, (Gen. Statutes Vt. ed. of 1863, p. 456). It would follow that, until it is expounded by our own supreme court, we should naturally look to the decisions of that state for its exposition. The 5th section of the Vermont statute is the same as our 5th section, with one or two slight verbal alterations which do not change the meaning; and the understanding of the supreme court of that state appears to be that it passes the fee, (or the full estate which the husband had,) to the widow, subject to the right of user in common with her, by the children during their minority. See Doane v. Heirs of Doane, 33 Vt. 649, 652; Day v. Adams, 42 Vt. 510, 516. See also 1 Washburn on Real Property, 352, where Prof. Washburn describes the interest of the wife, under the Vermont statute as follows: "The homestead belongs to her *in fee*, vesting upon the death of the husband, and on her death descends *to her heirs*." The late case of Day v. Adams, 42 Vt. 510, is, however, thought by some to support a different view.

Notes of Recent Tennessee Decisions.

IN THE SUPREME COURT AT JACKSON.

[Courtesy of Hon. J. O. Pierce of Memphis.]

Bonds of State and County Tax Collector.—The bonds were taken by the county commissioners, who have been since held to be usurpers of office. Though all the acts of the county commissioners were nullities, if it appear that the bonds were given for purposes which make it the interest of the state to accept them, acceptance will be presumed. State v. McLean, October Term, 1873.

Chancery Practice.—It is not the effect of consolidating causes, without more, to make the testimony taken in one cause apply as well to the other. Lofland v. Coward, October Term, 1873. See *Parties—Relief.*

Confederate Money.—Under pleas of *nil debet* and payment, the plaintiff need not account for the value of Confederate money received by him under duress, because there was no contract. Wilkins v. Fransioli, October Term, 1873.

Where an agency was revoked by the breaking out of the war, but the acts of the agent were subsequently ratified, the principal must account for the value, as scaled, of Confederate money received by the agent. Bruce v. Houghton, October Term, 1873.

Execution.—Property levied on by, and for which a delivery bond is taken, is *in custodia legis* until the forfeiture of the bond. James v. Kennedy, April Term, 1872; James v. Kennedy, April Term, 1873.

Fraud.—Gross inadequacy of price in a sale, is evidence of fraud, as affecting rights of creditors. Hartsfield v. Simmons, April Term, 1873.

———. If the bill alleges facts which constitute fraud, it is not necessary that they be so characterized. Moore v. Shepherd, October Term, 1873.

———. If one seeks to rescind a contract for fraud, he must give notice in a reasonable time after discovering the fraud, and if after knowledge he by act or by silence indicate an acquiescence, he cannot ask rescission. Gilbert v. Hunnewell, October Term, 1873.

Judgment.—see *Nul tiel record.*

Jury.—Want of instructions to, which are not demanded, is not error, if the charge as given reflects carefully and without obscurity the principles applicable to the case. Plunkett v. Robbins, October Term, 1873. See *Verdict.*

Justice of Peace—has no jurisdiction over $50—in a suit against a steamboat under the lien law. Goodloe v. Str. Lloyd, October Term, 1873.

———. Is not punishable for profanity by dismissal from office unless especially indicted therefor as a J. P. Carpenter v. State, Oct. Term, 1873.

Municipal Corporation.—A return of *nulla bona* on an execution against, is not alone sufficient cause for a mandamus to levy a tax. Kimbro v. Memphis, October Term, 1873.

Nul tiel record.—On plea of, in a suit on a foreign judgment, the court may try the question, whether the foreign court had jurisdiction of defendant's person. Barrett v. Oppenheimer, October Term, 1873.

Parties, in chancery.—A purchaser *pendente lite* being in any event bound by the result of the suit, he is not a necessary party, and the court is not bound to admit him as a party. Amer. Exch. Bank v. Andrews, October Term, 1873.

Partnership.—On an issue between the firm and third persons, as to the existence of the firm, while the articles alone are not evidence in its favor, (see 14 Wall. 570), they are still competent, when extrinsic evidence shows they were made on the day they bear date. Plunkett v. Robbins, Oct. Term, 1873.

———. In a suit against, on notes given by one partner in firm name, after dissolution, (plaintiffs having knowledge of the dissolution), in renewal of notes accrued before dissolution, the other parteners pleading *non est factum*, he is held discharged from the original consideration by the acceptance of the new notes, and discharged on the first notes because they were not sued. Farnsworth v. Wade, Oct. Term, 1873.

Relief.—Under a prayer for general, relief may be granted different from that specifically prayed for, if not inconsistent with case made by the bill. James v. Kennedy, April Term, 1873.

Rescission.—See *Fraud.*

Return.—Of Sheriff, upon an execution, may be attacked in chancery, for fraud or mistake. (Acc. 11 Hum. 526.) James v. Kennedy, April Term, 1872.

Taxes.—Though the assessment of, was unconstitutional, yet, as they were paid by the tax payers without protest, and are now in the hands of the tax-collector, he must refund to the state and county, and the remedy by motion exists. State v. McLean, October Term, 1873.

[CONTINUED IN OUR NEXT.]